LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAR 19 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 583

HENRY NAPUE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

GEORGE N. LEIGHTON
MARK E. JONES
123 West Madison Street
Chicago 2, Illinois
Counsel for Petitioner

INDEX

SUBJECT INDEX

	Page
Brief for Petitioner	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
(a) The Facts	4
(b) Questions Presented Below	8
Summary of Argument	8

ARGUMENT:

I. Petitioner's claim that his conviction was procured by the known use of perjured testimony is supported by the record and by the Supreme Court of Illinois in its opinion; therefore, under the doctrine pronounced by this court in *Mooney* v. *Holohan*, Petitioner has shown that he was denied due process of law in the Illinois Criminal Court 10

II. The record does not support the conclusion of the Supreme Court of Illinois that the perjury which was used in petitioner's trial was disclosed so as to preclude a serious constitutional question arising from petitioner's conviction 19

Conclusion 21

CASES:

Alcorta v. *State of Texas*, 355 U.S. 28 ..... 14, 15, 18
People v. *Savvides*, 1 N.Y.2d 554, 436 N.E.2d 853 17
Mooney v. *Holohan*, 294 U.S. 103 ..... 14, 18
Pyle v. *State of Kansas*, 317 U.S. 213 ..... 14, 18

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 583

HENRY NAPUE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

Petitioner, HENRY NAPUE, is under a sentence of 199 years in the Illinois State Penitentiary imposed by an Illinois criminal court. After petitioner's conviction, he brought a proceeding under the Illinois Post-Conviction Hearing Act claiming violation of rights under the Fourteenth Amendment to the Constitution of the United States. He claimed that his conviction was obtained through state procured perjury. Relief was denied petitioner in the Illinois trial court; and the Supreme Court of Illinois, with two justices dissenting, affirmed the trial court ruling. This court granted certiorari. Petitioner respectfully prays that the judgment of the Supreme Court of Illinois affirming denial of post-conviction relief be reversed.

Opinion Below

The opinion of the Supreme Court of Illinois is reported in 13 Ill. 2d 566, 150 N.E. 2d 613, and is reprinted at R. 76.

Jurisdiction

The final judgment of the Supreme Court of Illinois was entered on May 21, 1958 (R. 77). Petition for writ of certiorari to the Supreme Court of Illinois was filed August 19, 1958, and was granted on December 15, 1958, (R. 78).

The jurisdiction of this court rests upon 28 U.S.C., Sec. 1257 (3).

Questions Presented

I

Whether on the record at bar, petitioner was denied due process of law in an Illinois criminal court where petitioner was convicted after trial in which perjury of the principal witness was knowingly used by the State of Illinois to obtain the conviction of petitioner.

II

Is there valid justification in this record for the conclusion of the Supreme Court of Illinois that the infirmity of perjury, knowingly used by the prosecution to obtain petitioner's conviction in violation of the due process clause of the Fourteenth Amendment, was removed by other testimony of the perjurer?

Statutes Involved

Chap. 38, Sec. 358, Ill. Rev. Stat. (1953).

Homicide

Act of March 27, 1874, resumed.

(Murder) 140. Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Chap. 38, Sec. 360, Ill. Rev. Stat. (1953).

(Murder—Punishment) 142. Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court.

Chap. 38, Sec. 826-832 (1951), Post-Conviction Hearing Act.

"§ 826. Proceeding to determine whether constitutional rights were denied—Petition—Limitations

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction

there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7 of the supreme court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this Act shall be commenced more than five years after rendition of final judgment, or more than three years after the effective date of this act, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence. 1949, Aug. 4, Laws 1949, p. 722, § 1."

Statement

(a) *The facts.*

In June, 1940 petitioner was indicted by the grand jury of Cook County, Illinois for a murder alleged to have been committed in 1938 (R. 16, 20). He persisted in his innocence (R. 28), entered a plea of not guilty and was brought to trial before a jury in August of that year (R. 8). By that time, however, eye-witnesses to the alleged crime (R. 18) had moved from Illinois to the State of California (R. 20). The prosecution, therefore, relied upon the testimony of a man named George Hamer (R. 8-15) who had pled guilty to and had been sentenced for the crime with which petitioner was charged (R. 19, 20, 21).

Hamer was returned to Cook County on a writ of habeas corpus, and his testimony was extremely important to the prosecution (R. 20). In fact, without Hamer's cooperation

it was extremely doubtful that petitioner could have been convicted (R. 21).

After Hamer's testimony on behalf of the state, he was cross-examined by counsel for petitioner (R. 11-15). During this cross-examination the prosecuting attorney with whom Hamer had talked (R. 20-21) was present (R. 8). Hamer was asked these questions (R. 2-5):

Q. GEORGE HAMER, you were called a little while ago to come in here and testify?

A. Yes.

Q. And you refused to come in, didn't you?

A. I did not.

Q. It took quite a while for you to get here, didn't it?

A. They had to bring me from downstate.

Q. I mean while you were in the lock-up here. Didn't they ask you about 15 minutes before you got here, to testify?

A. No.

Q. Did anybody give you a reward or promise you a reward for testifying?

A. They ain't nobody promised me anything.

Q. Are you testifying of your own free will?

A. Yes.

* * * * * * *

Q. Now then, you Hamer are in jail under what term?

A. Stick-up and murder.

Q. What are you sentenced for?

A. One Hundred and Ninety Nine years.

Q. You hope to have that reduced don't you?

A. Well, if anybody would help me or do anything for me, why certainly I would.

Q. Weren't you expecting that when you came here today?

A. There haven't no one told anything, no more than

the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.

Q. Which lawyer was that?

A. I don't know; it was a Public Defender. I don't see him in here.

Q. You mean, he was from the Public Defender's Office?

A. I imagine that is where he was from, I don't know.

Q. And he was the one who told you that?

A. Yes, he told me he was trying to get something did for me.

Q. That was when you were informed that you were going to come and testify here?

A. I was informed that I was going to testify here when I left Stateville this morning.

Q. And when did this Public Defender lawyer come to see you?

A. He come back and talked to me a little while back.

Q. How long ago do you mean?

A. I don't know. There is not even a clock back there.

Q. Do you know the lawyer's name?

A. No, I don't.

* * * * * * *

Q. Then you spoke to a lawyer today who said he would try to get your time cut?

A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him.

Q. How do you know he is from the Public Defender's Office?

A. I seen him once before when I was being tried.

* * * * * * *

Re-Direct Examination.

By Mr. Meyers (R. 5):

Q. Mr. Hamer, has Judge Prystalski promised you any reduction of sentence?

A. No, sir.

Q. Have I promised you that I would recommend a reduction of sentence to anybody?

A. You did not.

* * * * * * * * *

After the re-direct examination, Hamer was excused without any further questioning (R. 15). On Hamer's testimony, the jury returned a verdict of guilty and sentenced petitioner to serve a term of 199 years in the Illinois State Penitentiary.

In 1946 (R. 24), the prosecuting attorney in petitioner's case resigned his position; and, on behalf of Hamer, filed a *coram nobis* petition in the Criminal Court of Cook County (R. 16-24) in which he alleged, under oath, that while he was the prosecuting attorney he caused Hamer to be brought from the Illinois State Penitentiary on a writ of habeas corpus *ad testificandum* as the principal and most important witness against petitioner (R. 20). He alleged that when Hamer arrived for petitioner's trial, he expressed a reluctance to cooperate with state authorities unless he, Hamer, were given definite assurances that a recommendation for reduction of his sentence would be made (R. 20). The former prosecuting attorney alleged that he was convinced that Hamer's testimony had to be obtained; therefore, he assured Hamer that a recommendation for reduction of his sentence would be made to proper authorities (R. 19-21). Having received these promises, Hamer agreed to testify against petitioner and furnish evidence necessary to obtain petitioner's conviction (R. 23).

The filing of the *coram nobis* petition by the former prosecuting attorney six years after petitioner's conviction was the subject of newspaper comments (R. 38) which were called to petitioner's attention (R. 38). Using the facts alleged in the *coram nobis* petition, petitioner filed a post conviction proceeding in the Criminal Court of Cook County.

(b) *Questions presented below.*

In his post conviction application petitioner claimed that because false testimony was used to obtain his conviction he was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 6, 7, 28, 29). After a hearing (R. 35-76), the trial court denied post conviction relief (R. 67-69). The Supreme Court of Illinois granted a review of the trial court proceedings (R. 69). With the Chief Justice and one Justice dissenting, the court affirmed the trial court judgment and rejected petitioner's federal constitutional claim that his conviction was obtained by knowing use of perjured testimony (R. 69-76). This court granted certiorari to review the judgment of the Supreme Court of Illinois (R. 78).

Summary of the Argument

I

The record, and indeed, the judgment of the Supreme Court of Illinois, sustains petitioner's claim that his conviction by an Illinois criminal court was procured through the known use of perjured testimony. It is clear that the testimony of the principal prosecution witness was perjury calculated to mislead the jury. The prosecuting attorney who was present throughout the testimony of the prosecution's principal witness knew that the testimony was false;

yet he remained silent, and knowingly used the perjured testimony to obtain petitioner's conviction.

Petitioner's conviction thus obtained deprived him of due process of law and is contrary to the general principles laid down by this court in *Mooney* v. *Holohan*, *Pyle* v. *The State of Kansas*, and *Alcorta* v. *Texas*.

II

The Supreme Court of Illinois, in its opinion from which two justices dissented, attempts to justify its departure from *Mooney* v. *Holohan* and *Pyle* v. *State of Kansas* by holding that the unconstitutional effect of the known use of perjury in petitioner's case was ameliorated by its revelation. However, the record does not sustain the Supreme Court of Illinois.

Furthermore, the due process clause of the Fourteenth Amendment to the Constitution of the United States is not satisfied by revealed perjury knowingly used to obtain a conviction. Perjury, if knowingly used in a state court to obtain a conviction deprives a defendant of due process of law whether disclosed or not. In any event, the record at bar shows that no ameliorating subsequent testimony was given by the perjured witness after he had falsely testified against petitioner in the presence of the prosecuting attorney.

ARGUMENT

I.

Petitioner's Claim That His Conviction Was Procured by the Known Use of Perjured Testimony Is Supported by the Record and by the Supreme Court of Illinois in Its Opinion; Therefore, Under the Doctrine Pronounced by This Court in Mooney v. Holohan, Petitioner Has Shown That He Was Denied Due Process of Law in the Illinois Criminal Court.

Petitioner's original application for post-conviction relief was filed by him as a poor person (R. 1-8). In it he alleged that in the state criminal trial " . . . One George Hamer was called as a witness on behalf of the People, and having first been duly sworn, testified against your petitioner after he was brought to the courtroom from the Illinois State Penitentiary . . . " (R. 2). Petitioner then incorporated portions of court records showing that before Hamer testified, the prosecuting attorney spoke with Hamer and assured him that a recommendation for the reduction of his sentence would be made in return for his testimony against petitioner (R. 6-7).

This same prosecutor was present throughout the trial of petitioner, including the time when Hamer testified (R. 8, 15, 16-24).

After Hamer's direct testimony, he was cross-examined (R. 2-6). Hamer then testified that he was testifying without promise of any reward or reduction of the sentence he was then serving (R. 3). In answer to questions put to him by counsel for petitioner, he testified that other than " . . . a Public Defender . . . " no one had made any representations to him concerning possible reduction of his sentence in return for his testimony (R. 4). On re-direct examination (R. 5), the prosecuting attorney who, before

Hamer testified, and in return for his testimony, had promised Hamer he would recommend a reduction in his sentence (R. 20-21), asked Hamer (R. 5), " . . . Have I promised you that I would recommend any reduction of sentence to anybody? A. You did not . . . "

To furnish an understanding of the background of Hamer's testimony, we point out that in Illinois a public defender system is maintained for the defense of the indigent. Hamer's testimony before the jury that the lawyer who had talked with him was " . . . a Public Defender . . : " carried a special evidentiary impact because in the Criminal Court of Cook County the Public Defender is well known, and his duties and functions are of common knowledge. The perjurous aspect of this phase of Hamer's testimony is borne out by the prosecuting attorney himself, who in his affidavit described in detail the contacts and the familiarity that existed between him and Hamer, a familiarity that had developed during the prosecution of Hamer for the crime with which petitioner was charged (R. 16-24).

Therefore, Hamer's testimony, before a jury, was unmistakably an " . . . effort to exclude all suggestions of any official promise . . . " (R. 75). It is readily apparent that this studied attempt by Hamer to mislead the jury was an attempt to elude the fact that in return for his testimony he had been promised consideration concerning the reduction of his sentence, not by " . . . a Public Defender . . . " who ordinarily would be acting on behalf of a defendant, but by the prosecutor who was then standing before him, the court and the jury; and who remained silent while Hamer was giving on behalf of the state, testimony which the prosecutor knew was not true. This conclusion is clearly evident from the affidavit of Mr. Meyer, the prosecuting attorney (R. 16-24).

It is plain that the false testimony used in this fashion by the state deprived petitioner of a fair trial. If Hamer

had truthfully revealed that the lawyer who had spoken with him was the prosecutor who was then standing before the jury, further inquiries could have been made by petitioner's counsel concerning his interest in giving testimony against petitioner and concerning promises which had been made to him by Mr. Meyer, the prosecuting attorney.

To have assured petitioner a fair trial the truth from this principal witness was important because he was the only person who could give evidence to secure petitioner's conviction. This fact is admitted in the prosecuting attorney's affidavit which he submitted as part of the petition for writ of *coram nobis* filed on behalf of Hamer, the witness (R. 18, 19, 20, 21). The Supreme Court of Illinois in its opinion found that " . . . in 1940 Hamer was called as the principal witness on behalf of the state . . . " (R. 70). The prosecuting attorney said that the importance of Hamer's testimony was vital because a witness to the alleged crime, Mrs. Neeley " . . . had moved to California and if brought back, and identification at that late date with so much time intervening from the time of the commission of the offense, would at best be highly questionable . . . " (R. 20). He went further and said that, " . . . It developed that Hamer's testimony was extremely important because the trial judge presiding at the trial of Napue ruled against the State's contention that evidence of previous robberies were admissible . . . " (R. 20). Finally, the prosecutor said that " . . . Without Hamer's testimony a conviction of Napue upon his own uncorroborated confession may have been extremely doubtful . . . " (R. 21).

Despite the inability of counsel for petitioner to elicit the truth from Hamer, the instinct of the cross-examiner caused him to ask this question (R. 5):

> Q. Then you spoke to a lawyer today, who said he would try to get your time cut?

A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him.

Now according to the prosecutor, " . . . Before testifying on behalf of the State and against Napue, Hamer expressed to your petitioner a reluctance to cooperate any further unless he was given definite assurance that a recommendation for the reduction of his sentence would be made . . . " (R. 20). This conversation took place a few moments before Hamer was called as a witness against petitioner (R. 51). The prosecutor, Mr. Meyer, had questioned Hamer at the time of his arrest in August, 1938, immediately after the alleged crime (R. 17-18). On several occasions there had been discussions and conversations between them concerning Hamer's participation in the crime with which petitioner was charged (R. 18-21). It is evident, therefore, that when Hamer said, " . . . That was this Public Defender. I don't even know his name. I could point him out if I saw him . . . " (R. 5), he was lying deliberately. And the prosecuting attorney knew it.

On re-direct examination the prosecuting attorney went over the same ground; and for emphasis, asked this question (R. 5):

Q. Have I promised you that I would recommend any reduction of sentence to anybody?

A. You did not.

This denial by Hamer elicited by the prosecuting attorney, is in direct conflict with the allegations in the prosecutor's affidavit which was made a part of petition for a writ of error *coram nobis* filed on behalf of Hamer some six years later (R. 16-24). In fact, the words of the former prosecutor are so strong that they deserve quotation here. He asked the court to grant relief to Hamer by construing the Illinois Habeas Corpus Act so as to give " . . . effectual consummation of the compact entered into between the

duly authorized representatives of the State of Illinois and George Hamer . . . " (R. 23), when Hamer agreed to give evidence against petitioner. Certainly, if there existed a compact between the " . . . duly authorized representatives of the State of Illinois and George Hamer . . . . " the judge and the jury that convicted petitioner on the evidence of the principal witness for the prosecution was entitled to this important information through truthful answers to questions put by petitioner's attorney on cross-examination (R. 2-5).

In its opinion, the Supreme Court of Illinois said, " . . . in the case at bar the evidence at the post-conviction hearing leaves little doubt that the prosecutor had promised Hamer if he would give testimony against Napue his cooperative actions would be brought to the attention of the appropriate authorities, to effectuate, if possible, a reduction of his sentence. This would be his reasonable understanding of the statements made by the prosecutor, and the state does not here deny that such a promise was made. Hamer's testimony to the effect that no promise had been given to him was clearly untrue . . . " The Chief Justice of the Supreme Court of Illinois joined in a dissenting opinion in which Mr. Justice Shaeffer said: "The opinion of the court holds that Hamer's testimony was false and that the prosecution knew that it was false . . . " (R. 73).

This being the case, the constitutional doctrine first pronounced by this court in *Mooney* v. *Holohan*, 294 U.S. 103, and applied in *Pyle* v. *State of Kansas*, 317 U.S. 213, and more recently extended in *Alcorta* v. *Texas*, 355 U.S. 28, controls this case.

The language of a unanimous court in *Mooney* bears repetition here, 294 U.S. 103 at 112:

> " . . . [due process of law] in safeguarding the liberty of the citizen against deprivation through the action of

the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 317, 47 S.Ct. 103, 71 L.Ed. 270, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to produce the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation . . ."

This general principle of constitutional law has never been weakened by this court in any subsequent case. Recently, in *Alcorta* v. *Texas*, 355 U.S. 28 this court, *per curiam*, extended the doctrines pronounced in *Mooney* and *Pyle* and reversed denial of a writ of habeas corpus to a petitioner who had alleged that he had been indicted for murder in a Texas court. Petitioner had relied upon a Texas statute which treated killing under the influence of sudden passion as murder without malice, and punishable by a maximum term of five years in prison. The theory of petitioner's defense in the state court was that he had suspected his wife of marital infidelity and that he had found his wife kissing the principal state witness while the witness and his wife were together in a parked car.

In response to inquiries by the prosecutor concerning his relationship with petitioner's wife, the state witness said that he had simply driven her home, and in substance testified that his relationship with petitioner's wife was nothing more than that of a casual friend. The witness' testimony was plainly inconsistent with the petitioner's

claim that he had found the witness and his wife kissing in a parked car.

Petitioner was convicted of murder with malice and sentenced to death.

After petitioner's conviction had been affirmed, the principal state witness issued a sworn statement in which he declared he had given false testimony at the trial. Petitioner then applied for a writ of habeas corpus in the trial court claiming that he had been denied a fair trial in violation of state and federal constitutions, because the principal state witness testified falsely with the knowledge of the prosecutor. In truth, petitioner claimed, the witness had been the lover of petitioner's wife and had sexual intercourse with her on many occasions.

A hearing was granted the petitioner. The principal witness for the prosecution then confessed that, contrary to his testimony in the trial, he had had sexual intercourse with petitioner's wife on five or six occasions. He testified that he had informed the prosecutor of this fact before trial, and the prosecutor told him that he should not volunteer any information about such intercourse; but if specifically asked about it, to answer truthfully. The prosecutor admitted these statements were true. Petitioner's application for habeas corpus was denied.

In reversing and remanding the cause this court said: "... It cannot be seriously disputed that Castilleja's testimony taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate

cause for a surge of 'sudden passion' in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja . . . "

A careful study of the *Alcorta* case reveals that perjury always accompanies—in one degree or another—suppression of evidence. Every perjuror suppresses evidence favorable to the side against which he testifies in order that he may express a falsehood. In *Alcorta*, for example, the principal state witness, with the knowledge of the prosecutor, suppressed information that he, the state witness had had intercourse with petitioner's wife. Positively he testified falsely; negatively he withheld the truth. This court wisely appreciated the impact of this falsity upon the jury, particularly when evaluated in connection with the background of the case itself. And this court extended and applied the *Mooney* and *Pyle* doctrines.

The Court of Appeals for the State of New York in *People* v. *Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, recently had before it the claim of a defendant who said that he had been prosecuted in a New York court, found guilty and sentenced, principally on the testimony of an alleged accomplice who had agreed to cooperate with the prosecutor. The agreement between the prosecutor and the witness was to the effect that, in return for his cooperation, he would be allowed to plead to a lesser offense. The witness performed his part of the bargain and testified; but on cross-examination before a jury, he denied that the prosecutor had made any promise of leniency.

The prosecutor who had entered into the agreement was present in court and remained silent when the witness denied that he had been promised consideration in return

for his testimony. In reversing the denial of a motion to set aside the verdict the Court of Appeals for the State of New York said:

1 N.Y.2d 554, 136 N.E.2d 853, at 854,

> "... It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth ... "

In view of the express holding of the Supreme Court of Illinois that in the case at bar the testimony of the principal state witness was false, with the knowledge of the prosecution, it is clear that perjured testimony was knowingly used by the prosecution to obtain petitioner's conviction. Therefore, the judgment of the Supreme Court of Illinois, should be reversed and remanded under the general principles laid down by this court in *Mooney* v. *Holohan*, 294 U.S. 103, *Pyle* v. *State of Kansas*, 317 U.S. 213, and extended in *Alcorta* v. *State of Texas*, 355 U.S. 28.

However, the Supreme Court of Illinois seeks to secure its affirmance of the trial court denial of post-conviction relief on the theory that disclosed perjury does not violate rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. We now point out the errors in the lower court judgment.

II.

The Record Does Not Support the Conclusion of the Supreme Court of Illinois That the Perjury Which Was Used in Petitioner's Trial Was Disclosed so as to Preclude a Serious Constitutional Question Arising From Petitioner's Conviction.

The Supreme Court of Illinois in affirming denial of post-conviction relief said: " . . . Hamer's testimony to the effect that no promise had been given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof . . . " (R. 72).

The Supreme Court of Illinois rests its judgment on this ground. However, it is sufficient to point to the dissenting opinion of the Chief Justice and of Mr. Justice Schaefer in which they say that the falsity of Hamer's testimony concerning a conversation with an unidentified "Public Defender" was never disclosed to the jury. Further, it was never revealed to the jury that Hamer, in fact, had not talked with an unidentified "Public Defender"; but in fact, his discussions had been with the prosecutor who was then before the court, who was standing before the jury as Hamer testified, and who remained silent and allowed the false testimony to be given without his revealing what he knew to be true. The dissenting opinion goes on to say, " . . . The effort to exclude all suggestion of any official promise is unmistakable. Thereafter, the prosecutor who had asked these questions and elicited these answers filed

a *coram nobis* petition on behalf of Hamer . . . " (R. 73, 75). The Chief Justice of the Supreme Court of Illinois and Mr. Justice Schaefer concluded that the record showed the prosecution deliberately used perjured testimony to bring about the judgment of conviction. Mr. Justice Schaefer concluded, " . . . I think that our own constitution and the Federal constitution require that a conviction so procured be set aside . . . " (R. 76).

It is true that in his testimony Hamer revealed his desire to be given some consideration on his sentence (R. 4-5). But it is also true that Hamer ended his testimony with a re-direct examination by the prosecuting attorney who asked him: (R. 5).

> Q. Have I promised you that I would recommend any reduction of sentence to anybody?
>
> A. You did not.

Thereafter, a few more questions were asked of Hamer; and it appears that he was excused and never was recalled for further testimony (R. 28).

It is obvious that the record does not support the conclusion of the Supreme Court of Illinois that Hamer's perjury was disclosed so as to apprise the jurors of his interest or motive in testifying. In fact, the falsity of Hamer's testimony was never revealed to the jury. Furthermore, this court has never said that disclosure of known perjury deprives it of unconstitutional impact. Nor does our constitutional law recognize the idea that a state court conviction obtained through the known use of perjured testimony is any less reprehensible merely because the perjury is disclosed to the jury. Therefore, we submit that the general principles laid down by this court in *Mooney* v. *Holohan*, *Pyle* v. *State of Kansas* and *Alcorta* v. *Texas*, control the case at bar; and that the judgment of the Supreme Court

of Illinois should be reversed and remanded with direction to the courts below to proceed in accordance with these established constitutional doctrines.

Conclusion

For these reasons, it is respectfully submitted that the judgment of the Supreme Court of Illinois be reversed and remanded with directions.

Respectfully submitted,

GEORGE N. LEIGHTON
MARK E. JONES
Counsel for Petitioner

MOORE, MING & LEIGHTON
Of Counsel